

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4477 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

U C SHAH

Versus

STATE OF GUJARAT

Appearance:

MR SR BRAHMBHATT for Petitioner
MS PS PARMAR for Respondent No. 1
MR KH BAXI for Respondent No. 2
MR PV HATHI for Respondents No. 3, 4
MRS KETTY A MEHTA for Respondents No. 5, 6
None present for other Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 15/08/97

C.A.V. JUDGEMENT

1. The petitioner, a Deputy Engineer (Mechanical) at the relevant time working in the Department of Public Health of the Government of Gujarat, challenges by this Special Civil Application the final seniority list of the

Deputy Engineers (Mechanical) published vide order dated 1st July, 1983, in which he has been placed junior to the private respondents.

2. The facts of the case are that on 16th May, 1966, the petitioner was appointed as Supervisor (Mechanical) in Public Health Department, Ahmedabad. The appointment to the post of Deputy Engineer (Mechanical) in the department upto 1976, as per the petitioner's case, was not governed by any statutory recruitment rules framed by the Government under Article 309 of the Constitution of India. Further the petitioner submitted that no separate non statutory rules were framed by the Government for Deputy Engineer (Mechanical) in Public Health Wing in general. The petitioner submitted that the Government used to follow the pattern laid down by the nonstatutory rules vide the circular of the Bombay Government dated 29th April, 1960 meant for the Engineers on the Civil side though the petitioner does not admit the same. Under the order dated 8th February, 1973, the petitioner was given promotion and appointed to officiate as Deputy Engineer until further orders. There is no dispute that in pursuance of this order, the petitioner joined the post of Deputy Engineer (Mechanical) on 15th May, 1973. The petitioner submitted that it was an unconditional promotion. The private respondents came to be appointed on the post of Deputy Engineer (Mechanical) by direct recruitment on being selected on the said post by G.P.S.C. vide order of the respondent dated 23rd March, 1973. It is not in dispute that all the private respondents joined the post of Deputy Engineer (Mechanical) before the petitioner joined the said post on promotion. Vide memorandum dated 29th April, 1976, a provisional seniority list of Deputy Engineers (Mechanical) as on 31st December, 1974 has been published and in the seniority list, the petitioner has been placed at Sr. No.7 and one Shri N.K. Lad was placed at Sr. No.8 and the private respondents were placed below these two persons. Another provisional seniority list came to be published under memorandum dated 1st December, 1981, as on 31st August, 1981 in which the position of the petitioner and the private respondents remained to be same as it was there in the earlier provisional seniority list. Vide order dated 1st April, 1983, the final seniority list of the Deputy Engineers (Mechanical) was published and therein the private respondents were shown senior to the petitioner and Shri N.K. Lad. Hence, this Special Civil Application.

3. During the pendency of the Special Civil Application, the petitioner has been promoted to the post

of Executive Engineer (Mechanical) pending further order vide notification dated 16th June, 1986. Further developments have also taken place. The petitioner and all the private respondents were sent to the Gujarat Water Supply and Sewerage Board. All the private respondents have also been promoted to the post of Executive Engineer (Mechanical). Two of the private respondents, namely, Shri S.T. Patel, and K.B. Patel were further promoted to the post of Superintending Engineer (Mechanical). Another private respondent, Shri R.V. Zinjuwadia has also been promoted to the post of Superintending Engineer (Mechanical). The petitioner has brought all these facts before this Court in this Special Civil Application by amending the Special Civil Application and further prayer has been made for quashing and setting aside of the order of promotion of other three persons on the post of Superintending Engineer (Mechanical).

4. The Special Civil Application has been contested by some of the private respondents as well as by the Government. The respondents No.4 and 7 filed their reply and the Government has also filed its reply. The respondent No.4 in reply to the Special Civil Application firstly, contended that the petitioner has deliberately suppressed material facts about the order passed by this Court and has further tried to mislead this Hon'ble Court by not disclosing the true facts to which the petitioner was fully aware being party respondent in the earlier petition. The respondent No.4 submitted that the recruitment rules for the post of Dy. Engineer (Mechanical) were provided in the circular of the Bombay Government dated 29th April, 1960 and that the Supervisor for being eligible for promotion as Dy. Engineer (Mechanical) was required to put in eight years of service before being eligible for promotion. As per the aforesaid eligibility criteria under the resolution referred above, the petitioner has become entitled for promotion only in May, 1974. He was promoted due to exigency of service before he became entitled on 8th February, 1973.

5. The Government has decided long back in 1960 that promotions under the relaxed criteria given to the Overseers (Mechanical) was not to be linked up with the seniority and for seniority such persons who were promoted under the relaxed criteria should be held eligible to claim seniority from the date when they satisfy the criteria as prescribed by the recruitment rules. The petitioner has been assigned seniority in the cadre of Dy. Engineer (Mechanical) as per the aforesaid

Government decision. It has next been submitted that the petitioner though the post have been advertised by G.P.S.C., have not applied for the same. The private respondents who were regularly recruited through the G.P.S.C. joined the post earlier to the petitioner and the petitioner was not eligible for promotion on the day on which they were appointed, and as such, they have rightly been placed senior to him. The service of the petitioner on the post of Dy. Engineer (Mechanical) for the purpose of seniority could have been counted from 15th May, 1974 and not from 15th May, 1973. Elaborating the plea of suppression of fact, the respondent No.4 stated that the petitioner though knowing well about the filing of the Special Civil Application by some of the private respondents being Sp.C.A. No.909/83 in connection with the provisional seniority list in which they have been shown junior and the petitioner was party to that Special Civil Application, but he has not disclosed this fact. It is not the case where the private respondents have not made any challenge to the placement of the petitioner above them in the seniority list against the provisional seniority list. The private respondents filed objections, but when those objection were not decided they have challenged the provisional seniority list of the year 1981 before this Court. In that petition, Shri Lad was also the party. In that writ petition, the State Government was called upon to file reply to the petition to show cause why the seniority list was not finalised.

6. In reply to the Special Civil Application, the State Government has come up with a case that the seniority list of Dy. Engineers (Mechanical) would be finalised within utmost expedition and thereafter the matter was adjourned from time to time. During the pendency of that Special Civil Application, the final seniority list dated 1st July, 1983, was published which was produced before this Court on 6th July, 1983 and ultimately, that petition basically become infructuous. Despite of the fact that the petitioners were represented by an advocate in the present petition they made an irresponsible statement and tried to give out an impression as if the final seniority list had suddenly and shockingly come. It has further been stated that the petitioner is abusing the process of the Court by raising the same issue which has already been adjudicated and decided by this Court in the case of Shri N.K. Lad who was immediate junior to the petitioner. Shri Lad filed Special Civil Application No.3199/83 earlier to the final seniority list. The Special Civil Application of Shri Lad was summarily rejected by this Court on 22-7-1981 by

a speaking order. The petitioner knowing well that the Lad's matter has already been decided, he filed this Special Civil Application after decision of the same and this fact has also not been disclosed in the Special Civil Application. A plea has been raised that the petitioner is agitating same issue in respect of the final seniority list which has already been decided by this Court. The respondent No.4 has taken almost identical defence as taken by the respondent No.7.

7. The State Government in reply to the Special Civil Application has come up with a case that the recruitment rules prescribed by the former Government of Bombay under its resolution dated 29th April, 1960 were followed by the Gujarat Government, and as per that rules, the petitioner was not eligible for promotion, but he has been given promotion by relaxing rules subject to the condition that his seniority shall be counted only from the date of his acquiring eligibility.

8. The learned counsel for the petitioner contended that the appointment of the petitioner on the post of Dy. Engineer (Mechanical) was unconditional. In the appointment order, no such conditions have been put that his appointment shall be considered to be regular only from the date on which his eight years services will be over on the lower post. It has further been contended that once the petitioner has been given unconditional appointment by promotion then the private respondents could not have been given the seniority above him. It is a case where the petitioner has been promoted by a mode of promotion whereas the private respondents have been appointed by direct recruitment, and as such, the promotee should have been given the seniority above the direct recruits. In connection with this contention, the counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in the case of A. Janardhan vs. Union of India reported in AIR 1983 SC 769. It has been submitted that the requisition had been sent by G.P.S.C. for appointment on the post of Dy. Engineer (Mechanical) in Irrigation Department, and as such, the appointment of the respondents in the Health Department is wholly arbitrary and unjustified and they could not have been given the seniority above the petitioner. The decision of this Court in the matter of Shri N.K. Lad is not binding on the petitioner as he was not the party to that petition. Further the counsel for the petitioner contended that the Lad's case was distinguishable as he was a workcharged employee whereas the petitioner was appointed in a regular establishment. Relying on the resolution of the Government of G.A.D.

dated 19th April, 1969, the petitioner submitted that the seniority of the promotee should be fixed with reference to his continuous officiation in the upper division and the date of the continuous officiation of the petitioner is 8th February, 1973 as under the said order he has been promoted, he should have been placed senior to the private respondents. The counsel for the petitioner contended that as per the resolution of the Government of the Public Works Department dated 16th March, 1979, the seniority inter-se of the direct recruits and the promotee has to be fixed with reference to the date of their continuous non-fortuitous officiation as Dy. Engineers in the Gujarat Service of Engineers Class-II. Lastly, the counsel for the petitioner contended that the respondent-State has not given an opportunity of hearing to the petitioner before finalising the provisional seniority list. In support of last contention, the counsel for the petitioner placed reliance on the decision of this Court in Sp. C.A. No.3701/84 decided on 11-3-1997 and decision of the Mysore High Court in the case of S.K. Potty vs. Union of India reported in 1969 S.L.R. 266.

9. The learned counsel for the respondent, on the other hand, refuted all the contentions made by the learned counsel for the petitioner. Shri P.V. Hathi, learned counsel for the respondents No.3 and 4 contended that the petitioner was given the promotion to the post of Dy. Engineer (Mechanical) though he was not eligible. In the exemption scheme, which has been introduced at the relevant time, the promotion has been given, but it was an understanding that this promotion will not confer any right of seniority in the cadre of Dy. Engineer (Mechanical). The seniority will only be counted from the date on which the petitioner shall complete the eight years' service on the lower post. It has next been contended that this matter is squarely covered by the decision of this Court given in the case of Shri N.K. Lad. Shri Hathi, further contended that the petitioner has no right of hearing against the final seniority list. The provisional seniority list in which the private respondents were shown junior to the petitioner had been challenged by them by filing the Sp. C.A. before this Court in which the petitioner was one of the parties. There the grievance was that the petitioner has wrongly been placed senior to them. The private respondents herein, filed objections against the provisional seniority list complaining against the placement of the petitioner senior to them. So what the learned advocate, Shri Hathi, contended is that the petitioner had sufficient opportunity of hearing in the matter though it

is different matter that ultimately that petition had become infructuous as the final seniority list had been published. To buttress this submission, the counsel for the respondents No.3 and 4 submitted that otherwise also, the petitioner has no case on merits. So this plea of violation of principles of natural justice is not tenable. Lastly, learned counsel, Shri P.V. Hathi, contended that in case, this position is accepted that while changing the position of the officer or employee in the final seniority list, an opportunity of hearing is to be afforded then it will be very difficult for the employer to finalise the seniority list. After final seniority list, the affected person has a right to either approach to the Service Tribunal, if appeal is provided, or to take any other appropriate legal remedy available. The counsel for the other respondents supported the contentions made by Shri Hathi.

10. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

11. Shri N.K. Lad was also shown senior to the private respondents in the provisional seniority list of Dy. Engineers (Mechanical). In the final seniority list, Shri N.K. Lad, was also placed junior to those private respondents as well as to the petitioner. The inter-se position of the petitioner and Shri Lad remained to be same in the final seniority list also. Shri Lad being aggrieved of the final seniority list, preferred Sp. C.A. No.3199/83 before this Court and that Sp. C.A. came to be decided by this Court on 22nd July, 1983. There the contention of Shri Lad before this Court was that he should have been placed above the private respondents in the final seniority list, as according to him these private respondents were appointed as Dy. Engineers (Mechanical) by direct recruitment after he was promoted as Dy. Engineer (Mechanical) and, therefore, they cannot rank above him. This contention of Shri Lad was not accepted by this Court. This Court has held as under:

It is not disputed that when petitioner was promoted as Deputy Engineer, Supervisor or Overseer holding Diploma in Engineering was eligible for promotion as Deputy Engineer only if he possessed 8 years' experience. Petitioner was appointed as Supervisor in the Public Health Department from which he was promoted to the post of Deputy Engineer on February 8, 1967/1973. He would have completed 8 years service on February 8, 1975. It is not disputed that but for the

Government Resolution dated April 30, 1970, he would not have been eligible for promotion until February 8, 1975. It appears that there was shortage of Deputy Engineers (Mech.) and, therefore, the Government by the said Resolution relaxed the eligibility criterion for promotion to the post of Deputy Engineer (Mech.) providing inter alia that diploma holders with five years' service would be eligible for promotion to the post of Deputy Engineer (Mech.). The resolution, however, made it clear "It was further decided that this promotion in the relaxed criteria need not be linked up with seniority and for seniority, such officers who were promoted under the relaxed criteria would be held eligible to claim seniority in the cadre of Deputy Engineer only when they satisfy regular unrelaxed criteria." It would thus appear that though a diploma holder possessing five years' experience was eligible for promotion to the post of Deputy Engineer, his seniority was to be counted only from the date on which he acquired the requisite 8 years experience. In other words, unless and until he satisfied the unrelaxed criterion of 8 years experience he was not to be considered for the purpose of inclusion in the seniority list. Therefore, though under the relaxed criterion petitioner was promoted to the post of Deputy Engineer on February 8, 1973, he became eligible for inclusion in the seniority list only on February 8, 1975. The Deputy Engineers, who were directly recruited before February 8, 1975, were, therefore, entitled to rank above the petitioner. Therefore, though six Deputy Engineers, whose names are mentioned in para 3 of the petition, were appointed after the petitioner, they would rank above the petitioner in the seniority list since they were appointed before February 8, 1975, the date from which petitioner's seniority in the cadre of Deputy Engineers was to be counted. I, therefore, do not see any substance in the claim made by the petitioner in this petition.

In the result, this petition fails and is summarily rejected. Interim relief vacated. Prayer to continue interim relief rejected. Notice discharged with no order as to costs.

12. In reply to the Sp. C.A., the State Government has come up with a case that it followed the Recruitment

Rules prescribed by the former Government of Bombay under resolution dated 29-4-1960. According to the said Recruitment Rules, it is not in dispute in between the parties, that a degree holder shall have three years experience, a diploma holder not less than eight years experience and non-qualified thirteen years experience, before he becomes eligible for promotion to the post of Deputy Engineer. The petitioner was appointed on the post of Supervisor on 16th May, 1966, and he would have completed his eight years services on 14th May, 1974. He has been promoted on this post under the order dated 8th February, 1973 and he joined this post undisputedly on 15th May, 1973. So, on the date on which he was appointed and he joined the post of Dy. Engineer (Mech.), as per the said resolution of the Bombay Government, which has been followed by the State of Gujarat, he was not eligible. The petitioner has also admitted this position in Para No.7 of the Sp. C.A.. The relevant portion of Para No.7 reads as under:

"The petitioner is a promotee from the lower cadre of Supervisor (Mechanical). Though it is true that the petitioner has not completed 8 years service as Supervisor (Mechanical), irregularity, if any, can be said to have been cured by the mere fact that he subsequently worked as Deputy Engineer for 1-1/2 years and it can never be argued by anyone subsequently that the promotion of the petitioner was irregular."

13. In Para No.4 of the Sp. C.A., the petitioner has further admitted that the appointments on the post of Dy. Engineer (Mech.) upto 1976 was not governed by any statutory recruitment rules framed under Article 309 of the Constitution. He further stated that it seems that the Government used to follow the pattern laid down by the non-statutory rules vide circular of the Bombay Government dated 29th April, 1960 meant for the Engineers on civil side. There is some addition in Para No.4 of the Sp. C.A. by pen and it is not signed. However, if it is read then what the petitioner stated that whatever is stated above he does not admit, but the petitioner has not produced on record of this Sp. C.A. any of the resolutions of the Government of Gujarat regulating promotions to the post of Dy. Engineers (Mech.). The matter would have been different where the petitioner had come up with some case of non-statutory rules for promotion to this post of Dy. Engineer (Mech.) in Health Dept. and in that case this statement of the petitioner that he does not admit the position of adoption of the circular of the Bombay Government would have been

considered. The averments made by the respondent-State Government in reply, as aforesaid, that the Bombay Government circular was followed has not been controverted by the petitioner by filing the rejoinder to the same. This position has also been accepted by this Court in the decision given in the writ petition filed by Shri N.K. Lad. So, I don't have any hesitation in holding that the promotions to the posts of Dy. Engineers (Mech.) at the relevant time were regulated under the provisions of the circular of the Bombay Government dated 29th April, 1960. The day on which the petitioner was promoted, he was not eligible. The contention of the petitioner that even if he was not eligible, but he has worked on higher post then he should have been given the higher seniority and this non-eligibility for promotion could not have been brought in his way. That contention is difficult to accept. The eligibility for promotion has to be considered on the lower post and in case the promotion has been made by giving relaxation to a non-eligible person, he cannot claim himself to be eligible on the ground that he worked on the higher post. The petitioner, as it comes out from the order dated 8th February, 1973, was given only officiating promotion until further orders. It was not the promotion given after considering his case for promotion by Departmental Promotion Committee or by Selection Committee. The petitioner would have acquired the eligibility for promotion only on 15th May, 1974 after more than one year of selection, appointment and joining of the private respondents on the post of Dy. Engineer (Mech.).

14. Under the resolution dated 30th April, 1960, the Government has resolved that on account of shortage of Overseers (Mech.) fit to be promoted as Dy. Engineers (Mech.), the Bombay Government in consultation with the B.P.S.C. had decided to relax criteria of eligibility for promotion as Dy. Engineers (Mech.). According to this decision, a degree holder with two years service and diploma holders with five years service were held to be eligible for promotion from the post of Overseers (Mech.) to the post of Dy. Engineers (Mech.). It was however, decided that these promotions under the relaxed criteria need not be linked up with seniority, and for seniority, such officers who were promoted under the relaxed criteria would be held eligible to claim seniority in the cadre of Dy. Engineers only when they satisfy the regular unrelaxed criteria. This relaxation criteria has also been made applicable in the case of the petitioner and Mr. Lad and they have been given the promotion, but the petitioner cannot take the benefit of only part of

the resolution and cannot be permitted to seek the benefit of resolution for all the purposes. His promotion under the relaxed criteria was subject to the condition that he would be eligible to claim seniority in the cadre of Dy. Engineer (Mech.) only when he satisfy the unrelaxed criteria. As stated earlier, as per the unrelaxed criteria, the petitioner would have been eligible for promotion only on 14th May, 1974. This Court has considered this resolution earlier in Sp. C.A. No.3199/83 and held that as per this resolution, the petitioner cannot claim any seniority in the cadre of Dy. Engineer (Mech.) earlier to his attaining the eligibility. So, for all the purposes, leaving apart whether the promotion of petitioner to the post of Dy. Engineer (Mech.) was regular or not, which point is not in controversy and none of the respondents has also put the same in controversy, the petitioner would have become entitled for seniority only from 14th May, 1974 i.e. his services on the post of Dy. Engineer (Mech.) shall be considered for seniority purpose as well as his eligibility for promotion to the next higher post only from 14th May, 1974. The petitioner shall be deemed to have been regularly promoted on the post of Dy. Engineer (Mech.) only from 14th May, 1974. Reference in this respect may have to the recent decision of the Hon'ble Supreme Court in the case of Ram Ganesh Tripathi & Ors. vs. State of U.P. & Ors. reported in 1997 (1) SCC 621. Their Lordships of the Supreme Court in the aforesaid decision in Para No.9 and 10 thereof, held as under:

9. The Government thereby has tried to give seniority to the respondents and those other adhoc employees by treating them as permanently appointed promotees since 2 years after the date of their joining the posts as Sahayak Nagar Adhikaris. Thus the respondents and other adhoc employees who had been appointed temporarily and whose services were not regular and were regularised only on 17-5-1985, will have to be treated as permanently appointed in 1974, as they were for the first time appointed on those posts in 1972. The said order was not challenged in the writ petition as it had not come to the notice of the appellants. It has been filed in this Court along with the counter-affidavit of Respondents 3, 7, 8 and 9 and is relied upon by all the respondents. This order also deserves to be quashed as it is not consistent with the statutory Rules. It appears to have been passed by the Government to oblige the respondents and similarly situated adhoc appointees.

10. We, therefore, allow this appeal and direct the Government not to treat any adhoc Sahayak Nagar Adhikari who was originally appointed on adhoc basis and whose service was regularised only on 17-5-1985 as senior to the direct recruits who were appointed before that date. We also quash and set aside the order passed by the Government under Rule 40(2) of the Rules whereby the employees appointed on adhoc basis and working continuously have been made permanent on those posts with effect from 2 years after the date of joining on those posts. The Government is directed to consider the seniority of the appellants and respondents as stated above and further consider the case of the appellants for selection grade accordingly and also in accordance with the government order dated 29-7-1986. The Government shall grant them the said benefit immediately if they are found to be eligible for the same. The Government shall complete the whole exercise within a period of two months from today. In the facts and circumstances of the case, there shall be no order as to costs.

So the services of the petitioner on the post of Dy. Engineer (Mech.) for the period from 15th May, 1973 to 14th May, 1974, cannot be counted for any purposes whatsoever i.e. for seniority as well as for eligibility to the next higher post.

15. The decision of the Hon'ble Supreme Court on which the reliance has been placed by the petitioner is of little help to him in this case. This case is totally distinguishable with the case which was there for consideration before the Hon'ble Supreme Court. Otherwise also, it is a settled law that in the absence of any statutory rules or non-statutory rules laying down the seniority inter-se of the promotees and direct recruits, the seniority has to be regulated on the basis of continuous non-fortuitous appointment. Leaving apart the question whether the appointment of the petitioner under the order dated 8th February, 1973 was fortuitous or not, the fact is that his services has to be counted for seniority on the post of Dy. Engineer (Mech.) from the date of joining on the said post and not from the date of the order. The learned counsel for the petitioner has failed to produce any resolution, rule or non-statutory rule which provides that the services of the promotee shall be counted for seniority from the date

of his appointment and date of joining the post has no relevance. So if we go by the date of joining on the post of Dy. Engineers (Mech.) then too all the private respondents have joined this post much earlier to the petitioner, and as such, otherwise also, the petitioner cannot claim seniority above them.

16. The respondents have been selected on the post by G.P.S.C. for which admittedly, the petitioner had not applied at the relevant time when they applied. The counsel for the petitioner has made a submission that the selection of the respondents have been made by the G.P.S.C. for the Irrigation Department, and as such, they could not have been appointed in the Health Department, but the fact is that the petitioner has not challenged their appointments. Moreover, the petitioner has not produced any documentary evidence on record to show that the requisition had been sent for appointments on the post of Dy. Engineers (Mech.) for the Irrigation Department. The petitioner has not produced even the advertisement published by the G.P.S.C.. In the absence of material factual evidence otherwise also this contention is not tenable. Over and above, the respondents have been appointed in the year 1973 and otherwise also, the challenge to their appointments by the petitioner after 10 years suffers from the vice of delay and laches.

17. The contention of the counsel for the respondents that the writ petition deserves to be dismissed only on the ground of suppression of material fact is also not tenable. The petitioner has disclosed in this Sp. C.A. regarding the filing of the Sp. C.A. by the private respondents.

18. The net result of the aforesaid discussion is that this writ petition has no merits and the same is dismissed. Rule discharged. Interim relief, if any, granted by this Court stands vacated. No order as to costs.

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